(1)

FILED

SEP 9 - 2005

No. 05-341

In The

Supreme Court of the United States

LARRY GREGORY
Petitioner
v.

JAMES L. GRACE, SUPERINTENDENT SCI-HUNTINGDON,
LYNNE ABRAHAM, DISTRICT ATTORNEY
OF PHILADELPHIA COUNTY,
THOMAS CORBETT, ATTORNEY GENERAL OF PENNSYLVANIA
Respondent(s)

On Petition For Writ of Certiorari
To the Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

ENID W. HARRIS, ESQUIRE
Pa. Supreme Court ID #30097
26 Pierce Street
Kingston, Pa., 18704
Phone: (570) 288-7000
Fax: (570) 288-7003
E-Mail: eharris@epix.net

DATE: September 9, 2005

Counsel for Petitioner,
Larry Gregory

QUESTIONS PRESENTED

1) Has Petitioner shown "actual innocence" as set forth in *Schlup v. Delo*, where new evidence in this case and in another case mandates the exclusion of evidence that violates the Sixth Amendment of the U.S. Constitution and leaves no direct or circumstantial evidence implicating the Petitioner?[1]

2) Does this Court recognize a waiver of a criminal defendant's constitutional right to confront and cross-examine a key witness' police statements where the prosecution claims that there is evidence that the Petitioner arranged the witness' murder but where, subsequent to Petitioner's trial, the evidence is disproved by the recantation of the trial testimony of the only witness to Petitioner's alleged arrangement of the witness's murder and by the convictions of two others for the witness' homicide for reasons unrelated to Petitioner or Petitioner's case?[2]

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[1]This question is before this Court in a case recently granted certiorari: *House v. Bell*, No. 04-8990. This Court is asked to hold consideration of this Petition pending a decision in *House v. Bell*.

[2]This question has been raised in a Petition for Writ of Certiorari in *Bush v. West Virginia*, No. 04-1328. Should this Court grant certiorari in *Bush*, this Court is asked to hold consideration of this Petition pending a decision in *Bush* or to decide this case with *Bush*.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a corporation and, therefore, does not have a parent, subsidiaries or affiliates that issue shares to the public.

Neither Petitioner nor Petitioner's counsel have any financial interest in this appeal

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TABLE OF AUTHORITIES

SUPREME COURT CASES:

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LIST OF PARTIES

All parties appear in the caption of the case on the cover page.[3]

[3]The names of the Superintendent of Current SCI-Huntingdon and the current Attorney General of Pennsylvania have been substituted pursuant to F.R.A.P. 43(c).

Petitioner, Larry Gregory, respectfully requests that the Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit..[4]

OPINIONS BELOW

The unreported Opinion of the United States Court of Appeals for the third Circuit, *Gregory v. Kyler*, Third Circuit No. 04-1636 (3d Cir., June 15, 2005), is appended as Exhibit "A". The unreported Opinion of the United States District Court for the Eastern District of Pennsylvania, *Gregory v. Kyler*, ED PA CIV No. 0-CV-0841 (E.D. February 19, 2004) is appended as Exhibit "B". The Report and Recommendation of Chief U.S. Magistrate Judge James R. Melinson (January 27, 2004) is appended as Exhibit "C".

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

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[4]All emphasis herein is supplied unless otherwise indicated. Respondents are referred to as "the Commonwealth".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the **Sixth Amendment of the United States Constitution** which reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district herein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The case also involves **28 U.S.C. §2254**, which states, in pertinent part:

> §2254. State custody; remedies in Federal courts
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that —

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) There is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

. . .

(3)(c)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —

(A) the claim relies on —

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

Procedural History:

State Court: Gregory and a co-Defendant, Sheldon Hannibal[5], following a jury trial in the Court of Common Pleas of Philadelphia County, were convicted of first-degree murder, possession of an instrument of crime, and criminal conspiracy. Gregory was sentenced to life imprisonment for the murder conviction and to concurrent terms of twenty four (24) to forty eight (48) months' imprisonment for criminal conspiracy and six (6) to sixty (60) months' imprisonment for the weapons offense. On April 4, 1997, the Superior Court of Pennsylvania affirmed judgment of sentence on direct appeal. *Commonwealth v. Gregory*, 698 A.2d 664 (Pa.Super. 1997) (table). The Superior Court Opinion in part adopted the Trial

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[5]The Commonwealth requested the death penalty as to both Gregory and Hannibal, and the jury at their trial was death-qualified. After a joint penalty hearing, the jury found no aggravating circumstances as to Gregory, and he received a sentence of life without parole. Sheldon Hannibal was sentenced to death.

Court's Opinion On October 2, 1997, the Supreme Court of Pennsylvania denied Gregory's Petition for Allowance of Appeal. *Commonwealth v. Gregory*, 701 A.2d 575 (Pa. 1997) (table).

On September 28, 1998, Gregory filed a *pro se* Petition for Post-Conviction Collateral Relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §9541 *et seq.* Appointed counsel filed a "no merit" letter pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa.Super. 1988). The PCRA Court permitted counsel to withdraw and dismissed the Petition without notice on November 10, 1999. The PCRA Court reinstated Gregory's rights because of the lack of notice. The Superior Court affirmed the Order of the PCRA Court on March 19, 2001. *Commonwealth v. Gregory*, 777 A.2d 502 (Pa.Super. 2001) (table). Gregory did not seek further review.

Federal Court: Gregory filed a *pro se* Petition for Writ of *Habeas Corpus* on February 6, 2002. The Petition was

referred to Chief U.S. Magistrate Judge Melinson. Gregory filed his amended Petition on November 5, 2003, and the Commonwealth filed a timely response. After consideration of the pleadings, the Magistrate accepted the Habeas Corpus Petition as timely filed but recommended the Petition be denied with prejudice because the issues raised were not previously presented to the State Courts and were not exhausted and procedurally defaulted. (App. Exh. "C").

The District Court adopted the Report and Recommendations of the Magistrate and denied a Certificate of Appealability by Order of February 19, 2004 (App. Exh. "B"). A Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed March 8, 2004. The Third Circuit denied a Request for Certificate of Appealability by Order dated June 15, 2005 (App. Exh. "A").

Statement of Facts:

In the early morning hours of October 25, 1992, Peter

LaCourt and a friend, Barbara Halley, encountered Sheldon Hannibal and Tanesha Robinson, sitting in a stairway at the Cambridge Mall housing project. LaCourt tried to sell Hannibal a gold chain. After looking at the chain, Hannibal started an argument with LaCourt concerning whether the chain was genuine. Hannibal refused to return the chain to LaCourt, pulled out a gun, and began to beat LaCourt with it. Barbara Halley went out to the guard's station in the lobby to seek help. After Halley left, Hannibal knocked on the door of a nearby apartment from which Larry Gregory allegedly emerged. Larry Gregory joined in the beating, using another gun to pistol whip LaCourt. As the beating continued, Tanesha Robinson ran up the stairway. After Robinson left the scene she heard approximately ten gunshots. There were no other witnesses, and no physical evidence found implicating Gregory or Hannibal in the LaCourt homicide.

In Tanesha Robinson's statement to the police of

October 26, 1992, and another statement to the police on February 11, 1993, she indicated that the individual that came out of the nearby apartment was known to her as "Junie". She identified a photograph of the Petitioner, Larry Gregory. On April 13, 1993, a Preliminary Hearing was held as to both Sheldon Hannibal and Larry Gregory. At the conclusion of the Preliminary Hearing, charges were bound over as to Sheldon Hannibal only, with the Magistrate determining that a *prima facie* case had not been made out against Larry Gregory.

At a second Preliminary Hearing for Gregory on May 4, 1993, Tanesha Robinson testified that she had attended school with Larry Gregory and knew him from the neighborhood and he was not the individual involved in the homicide of Peter LaCourt. She testified that the individual involved in the homicide of Peter LaCourt was not Gregory but another individual known by the nickname "Junie" and was taller than Larry Gregory. On August 4, 1993, Tanesha Robinson and two

other women were murdered. At the trial of Gregory and Hannibal, it was argued that Larry Gregory, Sheldon Hannibal and others planned and carried out the homicide of Tanesha Robinson at the request of Hannibal in order to prevent her testimony at their joint trial.[6] The testimony of two witnesses was presented in support of this assertion: Terrance Richardson, who testified that he was present for a conversation in Larry Gregory's apartment the day before the Robinson homicide in which Larry Gregory and others planned the homicide[7], and James Buigi a/k/a Brian Gilmore who testified that he was a cellmate of Hannibal from whom Hannibal requested legal advice about the effect at trial of a witness' unavailability and who testified that Hannibal told him "a couple of his boys"

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[6]There was no reason presented why Gregory wanted to prevent Tanesha Robinson's testimony as given at the Preliminary Hearing of May 4, 1993 that Gregory was not involved in the LaCourt homicide.

[7] Gregory, his brother Dwayne Fountain, and his sister, Kimberly Gregory, testified that no such meeting took place.

killed Tanesha Robinson. Hannibal did not identify the "boys". The only individual at the Hannibal/Gregory trial to testify to Gregory's plan to murder Tanesha Robinson was Terrance Richardson. Nonetheless, the Trial Court admitted the Preliminary Hearing transcripts of April 13, 1993 and May 4, 1993, as well as the police reports of Tanesha Robinson's statements of October 26, 1992 and February 11, 1993, concluding there was clear and convincing evidence that Gregory had Tanesha Robinson and her friends killed.

In 1996, subsequent to Gregory's trial, two other individuals (not Larry Gregory or Sheldon Hannibal) were convicted for the murder of Tanesha Robinson and her friends:

Fred Daughtry [8] and Anthony Butler a/k/a "Lefty"[9]. During Gregory's post-trial proceedings, Terrance Richardson recanted his trial testimony and indicated that he was disabled and did not leave his grandmother's house from August 1 until August 20, 1993 because of a bullet injury to his right thigh and did not hear the conversation as he had testified. Hospital records of Terrance Richardson were introduced as well as the testimony of his aunt and grandmother corroborating his recantation. Richardson testified that his prior statement was prepared for him by Detectives Hoffner and Dembeck and the Detectives coerced him into signing it. Richardson testified and Det. Hoffner agreed that Richardson was given favors by the

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[8]Fred Daughtry submitted an Affidavit on February 8, 2000, in the prosecution for the murders of Tanesha and her friends that there was no meeting or plan prior to the murders involving Larry Gregory, Dwayne Fountain or Terrance Richardson, that Dwayne Fountain and Larry Gregory did not participate in the murders, and the murders were to steal drugs not to prevent Tanesha Robinson's testimony.

[9]Charges were brought against Gregory and Dwayne Fountain in 1999 but were *nolle prossed* on July 21, 2002, after Daughtry and Butler were convicted.

Detectives, including a visit to his grandmother's house to pick up a pair of sneakers and at least two contact visits in jail with a female juvenile.

Federal Habeas Claims:

Gregory's *pro se* and Amended Petition for Writ of Habeas Corpus, challenged his conviction on numerous grounds. First[10], he alleged that the State Trial Court erroneously instructed the jurors that they could find him guilty of first-degree murder even if he did not have the specific intent to kill. Secondly, he alleged that the Trial Court erred in admitting testimony of a homicide detective (Hoffner) concerning the contents of the unsworn police statements of Tanesha Robinson, because Robinson was unavailable and could not be examined at Gregory's trial. Thirdly, he alleged that the prosecutor made reversible error by referencing the fact

[10]The issues set forth herein are as set forth in Gregory's Amended counseled Petition. The Magistrate's Report apparently references both the *Pro Se* and the Amended Petition interchangeably.

that three young women had been shot to death in his opening statement Fourthly, he alleged that he was deprived of his U.S. constitutional right to due process of law and effective assistance of counsel when his appellate counsel failed to raise the prosecutor's discovery violations on appeal, where the prosecutor failed to disclose critical impeachment evidence pertaining to its witness, Terrance Richardson. Fifthly, Gregory alleged ineffective assistance of counsel as follows:

a) failing to object to the prosecutor's opening statement as set forth above;

b) failing to request limiting instructions by the Trial Court as to the testimony of Commonwealth witness James Buigi, and

c) ineffective assistance of appellate counsel for failing to present legal argument and case law in support of the argument that there was a failure to request limiting instructions with respect to the testimony of Homicide Detective Jeff Piree regarding his observations of three dead bodies, failing to adequately argue in the Superior Court that it was error and/or ineffectiveness on the part of trial counsel for failing to introduce a pre-trial statement (of 4/27/93) given by Tanesha Robinson that would have impeached

the other hearsay statements of Tanesha Robinson.

Gregory also alleged that he is actually innocent of the homicide of Peter LaCourt.[11]

The Report and Recommendation of the Magistrate Judge determined Gregory's first claim was procedurally defaulted because it was not raised as a federal due process claim nor was any U.S. Constitution or any federal law cited in support of his assertion, and the Superior Court considered only state law in its determination that there was no error in the Trial Court's instruction. The Magistrate Judge determined Gregory's second claim was procedurally defaulted because it was raised only as an issue of state constitutional law, even though the Pennsylvania Superior Court discussed federal law [*United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982)] (App. Exh. "C", pp. 19a-20a). The Report and Recommendation

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[11]Gregory is also innocent of any complicity in the homicides of Tanesha Robinson and her friends on August 4, 1993.

rejected Gregory's third claim because it had not been raised as an issue of federal or U.S. constitutional law (App. Exh. "C", pp. 18a-19a). The Report and Recommendation did not address Gregory's fourth claim but, instead, addressed three issues which were neither raised nor argued in Gregory's Amended Habeas Corpus Petition (App. Exh. "C", pp. 27a-29a). As to Gregory's fifth claim, the Magistrate Judge agreed that several of the issues were presented to the Superior Court (App. Exh. "C", pp. 20a-28a). The Magistrate Judge concluded that the Superior Court's determination of three claims was reasonable and entitled to deference. The Magistrate found that another five ineffective assistance of counsel claims were rejected by the State Court on an adequate and independent state ground, *i.e.*, Gregory's Superior Court Brief failed to "present any legal argument or relevant case law and facts to support the claims." (App. Exh. "C", pp. 27a-29a). The Magistrate Judge determined that the Superior Court's rejection of Gregory's

claim that counsel was ineffective for failing to request a limiting instruction as to James Buigi's testimony was based upon a reasonable interpretation of the facts and entitled to deference. (App. Exh. "C", pp. 29a-31a). In a footnote, the Magistrate's Report summarily rejected Gregory's claim of actual innocence. (App. Exh. "C", p. 17a, fn. 3).

REASONS FOR GRANTING WRIT

1. THE CIRCUITS REQUIRE GUIDANCE ABOUT HOW TO APPLY *SCHLUP* IN CASES LIKE GREGORY'S IN WHICH CREDIBLE POST-CONVICTION EVIDENCE DISCREDITS THE ONLY EVIDENCE PRESENTED AGAINST PETITIONER.

For a decade, the courts of appeals have applied *Schlup* inconsistently to cases with indistinguishable facts. This Court should grant the writ to clarify the *Schlup* standard and give the lower courts much-needed guidance to avoid arbitrariness in resolving claims of actual innocence. A review of *Schlup* cases in the courts of appeals unearths inter-circuit and intra-circuit splits on several questions confronting courts considering

claims of actual innocence: 1) What is the appropriate approach for analyzing old evidence in light of new evidence? Must new evidence of innocence completely neutralize or eliminate the validity of old evidence of guilt, or is it sufficient for new evidence to raise doubt in the minds of the hypothetical "reasonable juror"?; 2) How are courts to evaluate the credibility of old and new evidence? Should judges view the evidence from the perspective of the trial jurors and assess the impact of the new evidence on the evidence the jury heard, or should they substitute their own credibility assessments in considering the weight of both kinds of evidence, or should they take some other approach?; and 3) Is it enough for the petitioner to undermine central aspects of the trial case against him, or must the petitioner present affirmative evidence of innocence in order to pass through the *Schlup* gateway?

This Court should grant certiorari to instruct the lower courts that when a post-conviction petitioner proffers evidence

which discredits the tenets of the trial case against him such that no reasonable juror viewing the old evidence in light of the new would vote to convict, *Schlup* should apply.

A. IMPACT OF NEW EVIDENCE ON OLD

This Court should grant certiorari to clarify that *Schlup* requires courts to evaluate the impact of the new evidence as a whole on the evidence presented to the jury which convicted the petitioner. See *Schlup*, 513 U.S. at 327-328.[12]

The divergent approaches to evaluating new evidence evinces the urgent need for clarification. For example, the Fifth Circuit has held that affidavits from trial witnesses recanting their prior testimony suffice under *Schlup*. See: *Wilkerson v. Cain*, 233 F.3d 886, 889, 892 (5th Cir. 2000). See also: *Fairman v. Anderson*, 188 F.3d 635, 644-645 (5th Cir. 1999).

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[12]("In assessing the adequacy of the petitioner's showing . . . the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.").

In *Souter v. Jones*, 2005 WL 86477 (6th Cir. Jan. 18, 2005). The Sixth Circuit held that the petitioner had, through the affidavits of several trial witnesses, who recanted central portions of their trial testimony, re-analysis of old physical evidence, and proffered testimony undermining the plausibility of the use of a particular model of beer bottle as the murder weapon, met *Schlup*'s innocence standard.[13] In contrast, the Third Circuit has found *Brady* material not turned over at trial in the form of prior inconsistent statements from trial witnesses, eyewitnesses to the crime, insufficient under *Schlup*. *Mattis v. Vaughn*, 80 Fed.Appx. 154 (3rd Cir. 2003)

B. AFFIRMATIVE SHOWING OF INNOCENCE REQUIRED?

The circuit courts have also adopted radically different approaches to the question whether *Schlup* requires an affirmative showing of innocence, more than effective

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[13]The Ninth Circuit has adopted a similar approach to *Souter*. See: *Cooper v. Woodford*, 358 F.3d 1117, 1120 (9th Cir. 2004) (*en banc*).

undermining of the prosecution's trial case. The Court should grant certiorari to instruct the lower courts that once the petitioner has produced enough evidence to meet the "no reasonable juror" standard, he should pass through the *Schlup* gateway, regardless of whether the new evidence entirely dismantles the pillars of the prosecution case against him or whether the new evidence affirmatively demonstrates innocence. See: *Schlup*, 513 U.S. at 329, 331.

In the case of *House v. Bell*, 386 F.3d 668 (6th Cir. 2004), the Sixth Circuit majority determined that, despite his strong proffer of evidence undermining the prosecution's trial case, because some evidence pointing to House's guilt remained unmolested by the new evidence, he failed under *Schlup*. See: *House*, 386 F.3d at 684-685.

In *Lucas v. Johnson*, 132 F.3d 1069 (5th Cir. 1998), the Fifth Circuit held that six pieces of new evidence "support[ive and] probative of Lucas's claims of innocence" which

corroborated the petitioner's alibi defense which had been presented at trial were insufficient to establish actual innocence. *Lucas v. Johnson*, 132 F.3d 1069, 1077-1078 (5th Cir. 1998). Yet, in *Fairman v. Anderson*, 188 F.3d 635 (5th Cir. 1999), the Fifth Circuit concluded that an eyewitness who recanted his trial testimony that the petitioner had not acted in self-defense, whose credibility had been credited by the district court, sufficed to meet the "more likely than not, no reasonable juror would have voted to convict" standard. 188 F.3d at 645. There is no logical distinction between the two kinds of evidence presented in *Lucas* and *Fairman*. Both were attempts to present affirmative proof of innocence through the new eyewitness testimony. Nevertheless, the Fifth Circuit reached opposite conclusions in each case. In yet another case, the Fifth Circuit concluded that newly discovered evidence merely impeaching a central trial witness was enough to warrant consideration of the petitioner's underlying claims. See: *Wilkerson v. Cain*, 233

F.3d at 891.[14]

The Ninth Circuit has similarly held that new evidence dismantling the prosecution's theory of the crime warranted allowing a petitioner to pass through *Schlup*, thereby not requiring that the petitioner affirmatively established his innocence. *Paradis v. Arabe*, 130 F.3d 385, 396 (9th Cir. 1997) See: *Jaramillo v. Stewart*, 340 F.3d at 877 (9th Cir. 2003).

2. IN A PURELY CIRCUMSTANTIAL CASE IN WHICH EVERY INDICIA OF GUILT PRESENTED AT TRIAL HAS BEEN WHOLLY NEGATED BY POST-CONVICTION EVIDENCE, IS PASSAGE THROUGH THE *SCHLUP* GATEWAY WARRANTED?

There is no question that the trial case against Larry Gregory was entirely circumstantial. It consisted of Tanesha Robinson's uncross-examined police statements and the

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[14](concluding that new affidavits from recanting eyewitnesses and from the petitioner's co-defendant claiming sole responsibility for the crime showed that "the jury was denied information essential to its assessment of [the central prosecution witness's] believability and, in turn, of the strength of the state's case against the defendant" and warranted an evidentiary hearing in district court).

testimony of Terrance Richardson that he overheard a conversation in which Petitioner and others planned the murder of Robinson.

Gregory's new evidence has dismantled every piece of circumstantial evidence the jury heard. Terrance Richardson's post-trial recantation of his trial testimony was corroborated by his aunt and his grandmother, by his medical records and by Det. Hoffner. It was also corroborated by one of the two men who murdered Tanesha Robinson and her companions (Fred Daughtry) who submitted a sworn affidavit in February of 2000 that he and Anthony Butler killed Robinson and her companions for drugs and neither the Petitioner nor Terrance Richardson was involved. No part of the prosecution's case remains unchallenged. This surely would not have been enough for the jury to conclude that "the finger of guilt is pointed unerringly at the defendant and the defendant alone[.]" *Crawford*, 470 S.W.2d at 613 (holding that in order to convict

on circumstantial evidence alone the facts and circumstances must be so interconnected as to point exclusively at the defendant's guilt).

The question, then, is when a petitioner's post-conviction case discredits all of the circumstantial evidence relied on by the jury, does *Schlup* require that reviewing courts allow the petitioner to pass through its gateway?

In Gregory's case, the record shows that there no longer remains sufficient evidence to support the jury's verdict, which was required to point to no hypothesis save guilt. Thus, *Schlup* requires that he pass through the gateway, *Id.* This Court should grant certiorari to clarify this requirement in cases like Gregory's in which circumstantial evidence, later discredited, formed the only basis for the petitioner's conviction. See also: *Cooper*, 358 F.3d at 1123; *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997); *Jaramillo*, 340 F.3d at 883; *Paradis*, 130 F.3d at 396; *Majoy*, 296 F.3d at 776; *McKenzie*, 326 F.3d at

726; *Souter*, 2005 WL 86477, at *13; *Wilkerson*, 233 F.3d at 892; *Fairman*, 188 F.3d at 645; *but see Lucas*, 132 F.3d at 1078.

3. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE CRITICAL QUESTION OF WHETHER ADMISSION OF HEARSAY EVIDENCE UNDER A FORFEITURE-BY-WRONGDOING EXCEPTION TO THE HEARSAY RULE VIOLATES THE CONFRONTATION CLAUSE.

This Court has held that out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendant had a prior opportunity to cross-examine the witnesses, regardless of whether such statements are deemed reliable by the Court. *Crawford v. Washington*, 124 Sup.Ct. 1354 (2004), abrogating *Ohio v. Roberts*, 448 U.S. 56. This Court should determine whether *Idaho v. Wright*, 497 U.S. 805 (1990), survives its decision in *Crawford v. Washington* and determine whether there are hearsay exceptions that allow

admission of the testimonial evidence of an unavailable witness who has not been cross-examined.

The hearsay exception at issue in this case, the waiver-by-misconduct rule, was codified in Fed.R.Evid. 804(b)(6), effective December 1997. It has been previously recognized by this Court in *Reynolds v. United States*, 98 U.S. 145 (8th Otto) 145 (1878) and *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330 (1934), overruled on other grounds *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964). The rule was applied by a number of circuit courts prior to the adoption of Rule 804. See, e.g.: *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000); *United States v. Emery*, 186 F.3d 921 (8th Cir. 1999); *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997) (*per curiam*); *United States v. Miller*, 116 F.3d 641 (2nd Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996); *United States v. Thai*, 29 F.3d 785 (2nd Cir. 1994); *United States v. Aguiar*, 975 F.2d 45 (2nd Cir. 1992); *Steele v. Taylor*, 684 F.2d 1193

(6th Cir. 1982); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976); *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982)[15]. By its plain terms, Rule 804(b)(6) requires a finding that the defendant acted with the intention of making the declarant unavailable as a witness. A number of cases decided after Rule 804(b)(6) also read an intent requirement. See, e.g., *United States v. Johnson*, 219 F.3d 349 (4th Cir. 2000); *United States v. Emery*, 186 F.3d 921 (8th Cir. 1999); *United States v. Dhinsa*, 243 F.3d 635 (2nd Cir. 2001). Several circuits have required, both before and since Rule 804, that the trial court hold an evidentiary hearing outside the presence of the jury in which the Government has the burden of proving by a preponderance of the evidence that (1) the defendant (or party against whom the out-of-court statement is offered) was involved in or responsible for, procuring the unavailability of

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[15] *United States v. Thevis* is the case upon which the Trial Court Petitioner's case relied to admit the uncross-examined statements of Tanesha Robinson.

the declarant "through knowledge, complicity, planning or in any other way," *United States v. Miller*, 116 F.3d at 668; and (2) the defendant (or party against whom the out-of-court statement is offered) acted with the intent of procuring the declarant's unavailability as an actual or potential witness. *United States v. Mastrangelo*, 693 F.2d 269 (1982); *United States v. Dhinsa*, 243 F.3d at 654; *United States v. Houlihan*, 92 F.3d at 1280. At such hearings, hearsay is admissible for the determination to be made by a "preponderance of the evidence". *U.S. v. Dhinsa*, 243 F.3d 653-654. But see.: *Emery*, 186 F.3d at 926. A finding that the defendant procured the unavailability of a witness results in a waiver not only of his confrontation rights but of his hearsay objections. Admission of such evidence based upon hearsay and on only a preponderance of the evidence render this Court's decision in *Crawford v. Washington* and the Confrontation Clause meaningless.

In this case, the testimony of a single witness (Terrance

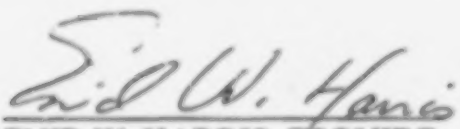
Richardson) was admitted without a hearing outside the presence of the jury as the sole basis for admitting the police statements of Tanesha Robinson. Terrance Richardson recanted his trial testimony subsequent to Gregory's trial and, two years later, two other individuals were convicted for the homicide of Tanesha Robinson and her companions for reasons unrelated to the homicide for which Petitioner was convicted. The uncross-examined statements of Tanesha Robinson read by Det. Hoffner at Gregory's trial were the only evidence of Gregory's involvement in the homicide of Peter LaCourt. Yet, the jury was invited to disbelieve the later sworn testimony of Robinson that Gregory was not involved in the Peter LaCourt homicide. Because Gregory was denied the opportunity to cross-examine and test the only evidence admitted against him, he was convicted for a homicide that he did not commit.

CONCLUSION

For the reasons stated above, this Court should grant the

Writ and review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



ENID W. HARRIS, ESQUIRE
Pa. Supreme Court ID #30097
26 Pierce Street
Kingston, PA 18704
Phone: (570) 288-7000
Fax: (570) 288-7003
E-Mail: eharris@epix.net
Counsel for Petitioner,
Larry Gregory

DATED: September 9, 2005

APPENDIX

UNITED STATE COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. **04-1636**

LARRY GREGORY
v.
KENNETH D. KYLER, et al.
(E.D. Pa. Civ. No. 02-cv-0841)

Present: SLOVITER, NYGAARD and FUENTES, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. §2253(c)(1), in the above-captioned case.

Respectfully,
Clerk

MMW/BNB/as/rls

ORDER

The foregoing request for a certificate of appealability is denied because Appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2). Appellant's claims that the trial court erroneously instructed the jury regarding first-degree murder and erred in admitting the

Exhibit "A"

unsworn statements of an eyewitness who was murdered before trial were not presented to the state courts as federal claims. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995). His allegations that his direct appellate counsel was ineffective and that the Superior Court abused its discretion and denied him due process were not presented to each level of the state courts. See Lines v. Larkins, 208 F.3d 153, 159-61 (3d Cir. 2000). These claims are now procedurally defaulted and Appellant has not made the showing necessary to overcome the procedural default. See Coleman v. Thompson, 501 U.S. 722, 750 (1991); Cristin v. Brennan, 281 F.3d 404, 412 (3d Cir. 2002). Assuming arguendo that Appellant properly exhausted his claim that he was deprived of a fair trial when the prosecutor referred to the murder of two women who were killed along with an eyewitness, the prosecutor's comments did not "'so infect [] the trial with unfairness as to make the resulting conviction a denial

of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). For essentially the reasons given in the Magistrate Judge's Report and Recommendation, appellant has not demonstrated that trial counsel's performance fell below an objective standard of reasonableness or that the allegedly deficient performance was prejudicial. See Strickland v. Washington, 466 U.S. 668, 687 (1984);

By the Court,
/s/ Richard L. Nygaard
Circuit Judge

Dated June 15, 2005
par/rls/cc: Mr.L.G. J.H.B., Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARRY GREGORY
Petitioner

v.

CIVIL ACTION NO.
02-CV-0841

KENNETH D. KYLER, ET AL.,
Respondents

ORDER

AND NOW, this 19th day of February, 2004, upon careful and independent consideration of Petitioner's Amended Petition for Writ of Habeas Corpus by a Person in State Custody, filed under 28 U.S.C. § 2254 on November 5, 2003, the Response of the Commonwealth, filed on November 25, 2003, the Report and Recommendation of Magistrate Judge James R. Melinson, filed on January 27, 2004, and the Petitioner's Objections to the Report and Recommendation of the Magistrate Judge, filed on February 5, 2004, it is hereby ORDERED consistent with the Report and Recommendation as

follows:

1. The Amended Petition for Writ of Habeas Corpus by a Person in State Custody, filed on November 5, 2003, is DENIED and DISMISSED.

2. The Report and Recommendation of Magistrate Judge James R. Melinson, filed on January 27, 2004, is APPROVED and ADOPTED.

3. Petitioner's Objections to the Report and Recommendation of the Magistrate Judge, filed on February 5, 2004, are OVERRULED and DISMISSED.

4. A Certificate of Appealability is DENIED for the reasons stated in the said Report and Recommendation.

5. We find that there has not been a substantial showing of the denial of a constitutional right.

6. This case is CLOSED.

BY THE COURT

_____

Franklin S. Van Antwerpen, U.S.D.J.

ENTERED
Feb 20, 2004
Clerk of Court

Exhibit "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARRY GREGORY
Petitioner

v.

CIVIL ACTION NO.
02-CV-0841

KENNETH D. KYLER, ET AL.,
Respondents

REPORT AND RECOMMENDATION

JAMES R. MELINSON
CHIEF U.S. MAGISTRATE JUDGE

Before this court is a *pro se* petition for a writ of *habeas corpus* filed pursuant to 28 U.S.C. §2254. The petitioner, Larry Gregory, is currently incarcerated at the State Correctional Institution at Huntingdon, Pennsylvania. In a prior report and recommendation, this Court recommended that the instant petition be denied with prejudice as untimely. Gregory filed objections and set forth the reasons for the delay in the filing of the petition and included various documents in support of his assertions. The Commonwealth did not file a response. On

August 26, 2002, the District Judge remanded the Petition to this Court for further consideration.

On December 13, 2002, retained counsel filed an entry of appearance on behalf of Gregory and requested additional time to review the file and prepare any appropriate submissions. On May 7, 2003, counsel asked for additional time in which to file supplemental pleadings. On July 7, 2003, counsel filed a submission that addressed the limited issue of the timeliness of Gregory's petition and, once again, asked for time to file an amended petition. The Commonwealth filed a response. On October 7, 2003, this court granted Gregory permission to file an amended petition within thirty (30) days, and provided the Commonwealth an additional twenty (20) days to file a response. Gregory filed his amended petition on November 5, 2003, and the Commonwealth filed a timely response.

After consideration of the additional pleadings, and for the reasons that follow, it remains this Court's recommendation

that Gregory's petition be DENIED with prejudice.[1]

DISCUSSION

It is well-settled that absent exceptional circumstances a federal court will not entertain a petition for a writ of *habeas corpus* until the petitioner has exhausted all means of available relief under state law. 28 U.S.C. §2254(b); O'Sullivan v. Boerkel, 526 U.S. 838, 839 (1999); Picard v. Connor, 404 U.S. 270, 275 (1971); Brown v. Cuyler, 669 F.2d 155, 157 (3d Cir. 1982). A petitioner "shall not be deemed to have exhausted the remedies available . . . if he has the right under the law of the state to raise, by any available procedure, the questions presented." 28 U.S.C. §2254(c). The policy of this total

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[1] The factual and procedural history of this case has been set forth in this Court's prior Report and Recommendation and will not be restated herein. After consideration of Gregory's explanation for the delay in filing this petition, and after reviewing the various documents filed in support of his claim that he diligently pursued his case in the state courts, this court finds that Gregory is entitled to the equitable tolling of the limitations period, and therefore, shall consider this petition as if it has been timely filed.

exhaustion doctrine is rooted in the tradition of comity: the state must be given the "initial opportunity to pass upon and correct alleged violation of the petitioner's constitutional rights." O'Sullivan, 526 U.S. at 844-45; Picard, 404 U.S. at 275. Exhaustion does not require that the highest state court rule on the merits of the petitioner's claims, but merely that the court be given the opportunity to review them. Bond v. Fulcomer, 864 F.2d 306 (3d Cir. 1989).

In order for petitioner to satisfy the exhaustion requirement, he must fairly present every claim included in a federal *habeas* petition to the highest level of the state courts. O'Sullivan, 526 U.S. at 846-47; Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). The burden of showing that all claims were fairly presented to the state's highest court is upon the *habeas* petitioner. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing Toulon v. Beyer, 987 F.2d 984 (3d Cir. 1993)). When a "state claim is not exhausted because it has not been

'fairly presented' to the state courts, but state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement may be satisfied because there is 'an absence of available state corrective process.'" Duncan v. Henry, 513 U.S. 364, 365-66 (1995); McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999). Where the petitioner has not presented claims to the state courts, and no state remedy remains available, the unexhausted claims are deemed exhausted but procedurally barred. O'Sullivan, 526 U.S. at 848 (citations omitted).

A federal *habeas* court is precluded from reviewing an issue of federal law raised by a state prisoner if the decision of the state court denying relief rests on a state law ground that is "independent of the federal question and adequate to support the judgment," whether it is substantive or procedural. Lambrix v. Singletary, 520 U.S. 518, 522 (1997); Coleman v. Thompson, 501 U.S. 722, 729 (1991); Harris v. Reed, 489 U.S. 255 91989).

A state procedural rule is considered independent if it does not rely on the merits of a federal claim or rests its decision primarily on federal law. Harris, 489 U.S. at 260-61. The procedural disposition must comport with similar decisions in other cases so there is a firmly established rule that is applied in a consistent and regular manner in the vast majority of the cases, Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997), and existed at the time of the state procedural default. Ford v. Georgia, 498 U.S. 411, 423-24 (1991); Doctor, 96 F.3d at 684.

In this petition, Gregory raises the following claims: 1) trial court error in its instructions to the jury that it was permitted to find an accomplice guilty of first degree murder without finding that he has the specific intent to kill; 2) trial court error in admitting the unsworn testimony of an eyewitness, Tanesha Williams, who was killed before trial; 3) prosecutorial misconduct for comments made in his opening statement; 4) ineffective assistance of trial counsel for: (a)

failing to object to the prosecutor's opening statement; (b) deferring his opening statement; (c) failing to request limiting instructions after prosecutor's opening statement; (d) failing to request a limiting instruction as to the admissibility of Brian Gilmore's testimony; (e) failing to request a limiting instruction after the testimony of a homicide detective concerning his observations of the body of Tanesha Williams and two other women; (f) failing to offer a pretrial statement that could impeach the statement of Tanesha Williams; (g) repeatedly failing to object to Commonwealth evidence that was irrelevant, immaterial, and highly prejudicial; (h) conceding in his opening statement that the Commonwealth had proved its case; and (i) failing to request a copy of the court order precluding the defense from receiving a pretrial copy of Brian Gilmore's statement and precluding the defense from being informed of the intended testimony of Terrence Richardson concerning Gregory's participation in the planning of the murder of

Tanesha Robinson; 5) ineffective assistance of appellate counsel for: (a) failing to seek reargument in the Superior Court; (b) failing to effectively argue the ineffective assistance of trial counsel; and (c) failing to raise various issues on direct appeal; 6) the Superior Court abused its discretion and denied Gregory due process by not granting relief based upon an affidavit showing that a Commonwealth witness, Fred Doughtry, had given false testimony at trial; and 7) the Superior Court denied Gregory due process by not serving him with notice that his PCRA appeal had been denied. In its response, the Commonwealth asserts that this petition was untimely; however, it further asserts that each claim is procedurally defaulted or otherwise without merit.

In his amended petition, Gregory provides further clarification of the claims raised in his original petition and attempts to establish cause sufficient to excuse his procedural default. In its responses, the Commonwealth contends that

Gregory has failed to present cause and prejudice sufficient to excuse his procedural default, and he has failed to demonstrate actual innocence, and as a result, Gregory's claims are not subject to federal *habeas* review, or are otherwise without merit. This court agrees with the Commonwealth for the reasons that follow.

First, this court finds that Gregory's fifth, sixth, and seventh claims concerning the alleged ineffective assistance of appellate counsel, the Superior Court's abuse of discretion and the Superior Court's denial of due process have never been presented in the state court. As a result, this court must conclude that the claims are procedurally defaulted because no avenue of state review remains available.[2] However, Gregory

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2 Further review of these claims is precluded by Pennsylvania law because the state courts would either dismiss a subsequent PCRA petition as untimely or find that the claims had been waived. See 42 Pa. C.S.A. §§ 9543(a)(3); 9544(b); 9545(b)(1). Petitions for collateral review must be filed within one (1) year of the date judgment becomes final unless the petitioner meets one of three limited exceptions that do not apply in the instant case. 42 Pa.

may obtain federal *habeas* review of these procedurally defaulted claims if he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claim would result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

To show cause, Gregory must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Id. At 753; Murray v. Carrier, 477 U.S. 478, 488 (1987); Sistrunk v. Vaughn, 96 F.3d 666, 675 (3d Cir. 1996). To establish the fundamental miscarriage of justice exception to the procedural

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C.S.A. §9545(b). See also Commonwealth v. Peterkin, 722 A.2d 638, 642-43 (Pa. 1998) (finding no jurisdiction to hear an untimely PCRA petition); Commonwealth v. Cross, 726 A.2d 333, 335-36 (Pa. 1999) (same); Commonwealth v. Banks, 726 A.2d 374, 376 (Pa. 1999) (same). Because the Pennsylvania Supreme Court has consistently applied the one-year statute of limitations as a procedural bar to all untimely PCRA petitions, this court must conclude that further review of any additional claims in the state court is clearly foreclosed.

default rule, Gregory must demonstrate "actual innocence." Schlup v. Delo, 513 U.S. 298, 324 (1995); Calderon v. Thompson, 523 U.S. 538, 559 (1998) (actual innocence sufficient to excuse procedural default requires petitioner to present reliable evidence not offered at trial to show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence").

Gregory did not address this procedural hurdle in his original petition, nor does his amended petition provide sufficient grounds to excuse the default. In his amended petition, Gregory appears to concede that the claims were not raised in state court, but he contends that the failure to assert the claims was due to the ineffective assistance of PCRA counsel.

It is well-settled that claims based on the ineffectiveness of PCRA counsel are not cognizable on *habeas* review. Pennsylvania v. Finley, 481 U.S. 551, 557 (1987). Moreover, a claim of ineffective assistance must "be presented to the state

courts as an independent claim before it may be used to establish cause for a procedural default." Edwards v. Carpenter, 529 U.S. 446, 452 (quoting Murray, 477 U.S. at 489). It is clear that Gregory has not presented a claim of ineffective assistance of PCRA counsel in the state courts. Furthermore, Gregory does not demonstrate cause for the default and actual prejudice or demonstrate that failure to consider this claim would result in a fundamental miscarriage of justice.[3] Thus, Gregory's fifth, sixth and seventy claims are not subject to federal *habeas* review.

Next, Gregory asserts several claims that were raised in the state court but only as violations of state law. To "fairly

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3 Although Gregory states that he is innocent of the crimes that are the subject of this petition, he provides no evidence of his innocence. A mere declaration of innocence is not sufficient to establish actual innocence. See Schulp, 513 U.S. at 324 ("To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial."); Calderon, 523 U.S. at 559.

present" a claim, a petitioner "must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." McCandless, 172 F.3d at 261. This court must conclude that Gregory has failed to "fairly present" his first, second, and third claims.

In his first and third claims, Gregory contends that the trial court erred in its instruction on first-degree murder and that the prosecutor engaged in misconduct based on statements made in his opening statement. These claims were first raised on direct appeal. A review of his appellate brief reveals that he raised no claim that his rights under federal law or the United States Constitution were violated. Gregory did not raise a due process claim, or cite the U.S. Constitution or any federal law in support of his assertion that he was entitled to a new trial. The Superior Court considered only state law in its determination that there was no error in the trial court's

instructions and relied on the trial court's opinion to dispose of the prosecutorial misconduct claim. Commonwealth v. Gregory, No. 1732 Philadelphia 1995, slip op. At 4-7. Having determined that these claims were not raised as federal claims, this court must also conclude that Gregory cannot obtain further state court review because the time for filing a petition for collateral review of his conviction has expired. Thus, these claims are procedurally defaulted.

Similarly, Gregory challenged the admission of two unsworn statements taken from an eyewitness, Tanesha Robinson. Again, this claim was raised as a violation of state law as counsel argued that the Pennsylvania Constitution provided greater protection in this regard than federal law. Moreover, Gregory did not contend that the state court erred in its interpretation and application of federal law in its consideration of this claim. As previously discussed, there is no opportunity for further state review of this claim, therefore, this

claim is also procedurally defaulted. Again, Gregory's supplemental petition fails to provide reason sufficient to excuse this default. Because Gregory has not demonstrated cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrated that failure to consider these claims would result in a fundamental miscarriage of justice, Gregory's first, second, and third claims are not subject to federal *habeas* review. Coleman, 501 U.S. at 750.

Gregory's remaining claims concern the ineffective assistance of trial counsel. In order to be eligible for federal *habeas* relief, Gregory must establish that the state court's adjudication of the merits of his claims: "1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court

proceeding." 28 U.S.C. §§ 2254(d)(1), (d)(2); Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1504 (2000). In addition, any factual determinations made by the state court shall be presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. §2254(e).

The United States Supreme Court, in Williams, set forth a two-part test for analyzing claims under §2254(d), making it clear that the "contrary to" and "unreasonable application" clauses of §2254(d) have independent meaning. First, under the "contrary to" clause, a federal *habeas* court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently from the Supreme Court on a set of materially indistinguishable facts. Id. At 1519. Second, under the "unreasonable application" clause, a federal *habeas* court may grant the writ if the state court identifies the correct legal principle from the Supreme Court's decisions but unreasonably

applies that principle to the facts of the prisoner's case. Id. At 1520. The "unreasonable application" inquiry requires the *habeas* court to "ask whether the state court's application of clearly established federal law was unreasonable." Id. At 1522. See also Hameen v. Delaware, 212 F.2d 226, 235 (3d Cir. 2000) (discussing Williams; Early v. Packer, 537 U.S. 3, 10-11 (federal courts may not substitute their own judgment for that of the state court).

When reviewing claims of ineffective assistance of counsel, this court must view the totality of the evidence before the trial court and determine whether the petitioner has shown that the decision reached is reasonably likely to have been different, absent the alleged ineffectiveness of counsel. Strickland v. Washington, 446 U.S. 668, 695 (1984). To prevail, petitioner must satisfy a two-pronged test by establishing that: (1) counsel's performance was deficient; and (2) counsel's deficient performance prejudiced the defense. Id.

At 687.

A strong presumption exists that counsel's conduct falls within the wide range of reasonably professional assistance. Id. At 689. To demonstrate that counsel's performance was deficient, the petitioner must show that counsel's representation fell below an objective standard of reasonableness based on the facts of the particular case, viewed as of the time of counsel's conduct. Id. At 688, 690. To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. At 694. A reviewing court need not determine whether counsel's performance was deficient before considering whether the petitioner suffered any prejudice as a result of the alleged deficiency. If it is easier to dispose of an ineffectiveness claim for lack of the requisite prejudice, that course should be followed. Id. At 697. The determination of whether a state court erred in denying a claim

of ineffective assistance of counsel requires this court to review whether the state court's application of Strickland was objectively unreasonable. Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2000). In addition, "counsel cannot be deemed ineffective for failing to raise a meritless claim." Id. At 203 (citing Commonwealth v. Carpenter, 725 A.2d 154 (Pa. 1999)).

First, Gregory claims that his trial counsel was ineffective for failing to object to the prosecutor's opening statement. As noted by the trial court, this claim is belied by the record as trial counsel did raise an objection to the prosecutor's reference to other murders and moved for a mistrial. Thus, this court must concur with the conclusion of the state court that this claim lacks arguable merit.

Next, Gregory claims that trial counsel was ineffective for deferring his opening statement. The Superior Court concluded that deferring his opening statement was a tactical decision designed to permit defense counsel the opportunity to

refute all of the Commonwealth's evidence; and therefore, this decision was made to reasonably effectuate Gregory's interests. Commonwealth v. Gregory, No. 1732 Philadelphia 1995 at 11-12 n.5. Gregory has failed to establish how this strategical decision by trial counsel was unreasonable or how it prejudiced him. In t he absence of such an offer of proof, this court cannot find that the state court's determination was objectively unreasonable. Werts, 228 F.3d at 204.

Gregory also asserts that trial counsel was ineffective for "conceding in his own opening statement delivered at the close of the Commonwealth's case, that the Commonwealth had proved [in] their case-in-chief all that they had intended to prove." The Superior Court found as follows:

> ... Gregory bases his argument upon the following remark by trial counsel: "The Commonwealth has rested its case and that means that they have proved to you what they intend to prove in their case-in-chief." Contrary to Gregory's assertion, however, a review of trial counsel's opening statement reveals that

> trial counsel argued that the Commonwealth's case was just a story, that Gregory was presumed innocent, and that the jurors should not form an opinion until they had heard defendant's case. The plain meaning of trial counsel's statement upon which Gregory relies is not an admission of proof, but rather an attestation that the Commonwealth fell short of its burden of proof. When placed in its proper context, the remark tends to favor defendant, not hinder him. Consequently, we find that trial counsel was attempting to effectuate his client's interests and that Gregory was not prejudiced.

Commonwealth v. Gregory, No. 1732 Philadelphia 1995 at 11-12. Accepting these facts as found by the state court in absence of clear and convincing evidence to the contrary, this court cannot conclude that the state court's determination is objectively unreasonable. Werts, 228 F.3d at 204. Early, 537 U.S. at 11 (§2254(d) requires "that decisions which are not 'contrary to' clearly established Supreme Court law can be subjected to habeas relief only if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.'")

(emphasis in the original).

Gregory also asserts several claims of ineffective assistance of counsel that were summarily rejected by the Superior Court. Specifically, the Superior Court rejected Gregory's claims that trial counsel was ineffective for failing to: a) request limiting instructions when offered by the trial court following the prosecutor's opening statement; b) request limiting instructions when offered as to the testimony of homicide detective Jeff Piree regarding his observation of the body of Tanesha Robinson and two other young women discovered shot to death; c) introduce a pre-trial signed statement given by Tanesha Robinson; d) object to Commonwealth evidence that was irrelevant, immaterial, and highly prejudicial; and e) make any request for inspection of a copy of an order precluding the use of James Buigi's statement and precluding the defense from being informed of the intended testimony of Terrence Richardson.

Each of these claims were rejected by the Superior Court because Gregory failed to "present any legal argument or relevant case law and facts to support the claims." Relying on state law, the Superior Court held that the claims were not properly raised. Commonwealth v. Gregory, No. 1732 Philadelphia 1995 at 16 n.8 (citing Commonwealth v. Baker, 614 A.2d 663, 673 (Pa. 1992) ('generalized claims of ineffectiveness raised in a vacuum must be rejected"); Commonwealth v. Sanford, 445 A.2d 149 (Pa.Super. 1982)).

It is well-settled that a federal court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman, 501 U.S. at 729. In his original petition, Gregory fails to address this default or establish cause and prejudice resulting from the state court's disposition of these claims or demonstrate that the failure to consider these claims would

result in a fundamental miscarriage of justice. In his amended petition, Gregory contends that PCRA counsel was ineffective for failing to pursue these claims. As previously discussed, this claim was never presented in the state court and the ineffectiveness of PCRA counsel is not cognizable on *habeas* review. Murray, 477 U.S. at 489; Finley, 481 U.S. at 557. Accordingly, this court is constrained to find that each of these claims of ineffective assistance of counsel is procedurally defaulted and not subject to federal *habeas* review.

Gregory's next claim concerns the ineffective assistance of trial counsel for failing to request a limiting instruction advising the jury that witness James Buigi's testimony was admissible only against Gregory's co-defendant. At trial, co-defendant Sheldon Hannibal was cross-examined with a statement made by Buigi in which Buigi alleged that Hannibal had made statements to him implicating Gregory in the crime. Gregory alleges that the use of these statements violated his

rights under the Confrontation Clause of the Sixth Amendment.

The Superior Court rejected this claim finding as follows:

> Gregory also argues that the Commonwealth's use of statements elicited by James Buigi concerning conversations that Buigi had with Gregory's co-defendant, Hannibal, should have been inadmissible because admitting the statements violated the Confrontation Clause of the Sixth Amendment. See Bruton v. U.S., 391 U.S. 123 (1968) (co-defendant's unredacted out-of-court statements implicating defendant are inadmissible when co-defendant fails to testify). Where a co-defendant testifies and is subject to cross-examination, however, the Confrontation Clause of the Sixth Amendment does not bar out-of-court statements made by that co-defendant. See Commonwealth v. Wheeler, 645 A.2d 853 (Pa.Super. 1994) (prosecutor permitted to refer to co-defendant's out-of-court statements where co-defendant testified and was subject to cross-examination). Here, co-defendant Hannibal testified, and was subject to cross examination. Because Hannibal specifically testified that he never made any statements to James Buigi, the Commonwealth was, therefore, permitted to question Hannibal concerning statements that he made during cross-examination. This argument, therefore, must also fail.

Commonwealth v. Gregory, No. 1732 Philadelphia 1995 at 14 n.7. Once again this court must accept the facts as found by the state court in the absence of clear and convincing evidence to the contrary. Having done so, this court cannot conclude that the state court's rejection of this claim of ineffective assistance of counsel is objectively unreasonable. Counsel cannot be deemed ineffective for failing to raise a meritless claim. Werts, 228 F.3d at 203.

Having carefully considered each of Gregory's claims, this court finds that Gregory has failed to establish a claim that would require federal *habeas corpus* relief. Therefore, this court makes the following:

RECOMMENDATION

AND NOW, this 27th day of January, 2004, IT IS RESPECTFULLY RECOMMENDED that the petition for a writ of *habeas corpus* be DENIED with prejudice. It is also

RECOMMENDED that a certificate of appealability not be granted.

BY THE COURT:

JAMES R. MELINSON
CHIEF U.S. MAGISTRATE JUDGE

FILED JAN 27 2004

No. 05-341

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY GREGORY,

Petitioner,

v.

JAMES L. GRACE, SUPERINTENDENT SCI-HUNTINGDON, LYNNE ABRAHAM, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, THOMAS CORBETT, ATTORNEY GENERAL OF PENNSYLVANIA,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

RONALD EISENBERG
Deputy District Attorney
THOMAS W. DOLGENOS
Chief, Federal Litigation
J. HUNTER BENNETT
Assistant District Attorney
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The Order of the Third Circuit denying Gregory's request for a Certificate of Appealability and holding that he had failed to make the showing necessary to overcome procedural default is Gregory v. Kyler, Third Circuit No. 04-1636 (3d Cir. June 15, 2005) (Pet. App. at "A").

The judgment of the United States District Court for the Eastern District of Pennsylvania approving and adopting the Report and Recommendation and dismissing Gregory's Petition for Writ of Habeas Corpus with prejudice is Gregory v. Kyler, Civil Action No. 02-0841 (E.D.Pa. February 20, 2004) (Pet. App. at "B").

The Report and Recommendation recommending that Gregory's Petition for Writ of Habeas Corpus be dismissed with prejudice and without a hearing is Gregory v. Kyler, Civil Action No. 02-0841 (E.D.Pa. January 27, 2004) (Pet. App. at "C").

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Title 28 U.S.C. §2254(b) provides:

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

COUNTER-STATEMENT OF THE CASE

In the early morning hours of October 25, 1992, Peter LaCourt and his companion, Barbara Halley, were on their way to buy beer in Philadelphia's Cambridge Mall housing project when they had the misfortune of encountering Sheldon Hannibal (aka Trini), and 15-year-old Tanesha Robinson on the stairs between the second and third floors of 948 North 11th Street. Mr. LaCourt offered to sell a gold chain to Hannibal. After inspecting the chain, Hannibal announced that it was a fake and punched Mr. LaCourt in the face. At this point, Ms. Halley ran to seek help from the building security guard, while Hannibal continued to punch and kick LaCourt. Not content with the damage that he could inflict with his own hands and feet, Hannibal drew a gun and

began to pistol-whip LaCourt with it. (N.T. 3/1/94 at 46-48; 3/4/94 at 83-87, 93-97).

When Mr. LaCourt tried to flee, Hannibal pointed the gun at him and ordered him to stop or be killed. Mr. LaCourt did as he was told and got down on his knees with his hands behind his head. At that point, Hannibal knocked on the door of petitioner Larry Gregory's apartment. When Gregory (aka "Junie") opened the door, Hannibal spoke to him briefly, at which point, Gregory went back into the apartment and emerged with a large gun. Gregory and Hannibal viciously pistol-whipped LaCourt until Hannibal ended his life with a hail of bullets. (N.T. 3/1/94 at 49; 3/4/94 at 87-91, 97-101, 106-108, 114-115).

On February 11and February 15, 1993, Tanesha Robinson gave statements to police in which she identified Gregory as the man who had assisted Hannibal in the beating/murder of Peter LaCourt. During a preliminary hearing held on April 13, 1993, Tanesha once again identified Gregory as the man who came out of his apartment and participated in the beating/murder of LaCourt. At a second preliminary hearing held less than a month later, Tanesha recanted her police statements and prior testimony, claiming that Gregory was not the man whom she had seen assisting Hannibal. The prosecutor impeached Tanesha with her two police statements. (N.T. 3/4/94 at 89-90, 104-119, 126-32).

On August 4, 1993, Gregory and Hannibal had Tanesha killed to prevent her from testifying against them. Two of Tanesha's friends who had the misfortune of being with her at the time of the killing were also murdered. Tanesha was declared "unavailable" to testify at trial and her

preliminary hearing testimony, during which she had been impeached with her police statements, was read into the record. Her two police statements were also admitted pursuant to the "forfeiture by wrongdoing" exception to the hearsay rule. (N.T. 2/28/94 at 90, 105, 122; 3/3/94 at 73, 76-77; 3/4/94 at 104-134).

A jury convicted Gregory and Hannibal of first-degree murder, criminal conspiracy and possession of an instrument of crime. During the penalty phase, the jurors concluded that the Commonwealth had failed to prove aggravating circumstances warranting the imposition of the death penalty and, thus, affixed Gregory's punishment at life in prison. (Hannibal, on the other hand, was sentenced to death). Gregory received concurrent sentences on his other convictions.

The Superior Court of Pennsylvania affirmed the judgment of sentence in a memorandum opinion dated April 4, 1997. Commonwealth v. Gregory, 698 A.2d 664 (Pa. Super. 1997). On October 2, 1997, the Supreme Court of Pennsylvania denied Gregory's Petition for Allowance of Appeal. Commonwealth v. Gregory, 701 A.2d 575 (Pa. 1997).

On September 28, 1998, Gregory filed a *pro se* petition for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act (PCRA). Counsel was appointed and, subsequently, filed a "no merit" letter in accordance with Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). The PCRA court allowed counsel to withdraw and dismissed the appeal without notice on November 10, 1999. Because it failed to give petitioner 20 days notice prior to dismissing the appeal, the PCRA court granted Gregory the right to appeal

nunc pro tunc on January 12, 2000. The Superior Court affirmed the PCRA court's dismissal on March 19, 2001. Commonwealth v. Gregory, 777 A.2d 502 (Pa. Super. 2001). Gregory did not seek allowance of appeal.

On February 19, 2002, petitioner filed a *pro se* Petition for Writ of Habeas Corpus. Subsequently, petitioner retained counsel who filed an amended petition. The Honorable James R. Melinson issued a Report and Recommendation on January 29, 2004, recommending that the petition be dismissed because the claims were all either procedurally defaulted or meritless. Gregory filed objections, which were overruled by the Honorable Franklin S. Van Antwerpen, who dismissed the petition with prejudice on February 20, 2004.

Gregory filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit, which denied a Certificate of Appealability on June 15, 2005, explaining that he had failed to make the showing necessary to overcome the procedural default of his claims and that the claims that were not defaulted were meritless.

On September 9, 2005, petitioner filed the instant Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. GREGORY'S PORTRAYAL OF HIMSELF AS AN INNOCENT MAN IS BASED UPON SEVERAL FACTUAL MISSTATEMENTS WHICH, WHEN CORRECTED, EVISCERATE HIS ACTUAL INNOCENCE CLAIM.

Gregory presents his case to this Court as an appropriate vehicle to clarify the "actual innocence" standard in federal habeas cases. To that end, he portrays himself as an innocent man, framed with flimsy (and now, allegedly discredited) evidence, and railroaded by overzealous prosecutors. But this is not an accurate portrayal of the evidence in this case, and petitioner is not "actually innocent" by any stretch of the imagination.

In an effort to improve his actual innocence claim, Gregory makes several inaccurate statements about the evidence adduced in both this case and the Commonwealth's separate prosecution of Anthony Butler for the murder of Tanesha Robinson. These misstatements, when corrected, shatter Gregory's claim of innocence.

INACCURACY: "The uncross-examined statements of Tanesha Robinson read by Det. Hoffner at Gregory's trial were the only evidence of Gregory's involvement in the homicide of Peter LaCourt."

Throughout his petition for writ of certiorari, Gregory complains about the trial court's decision to allow Detective Walter Hoffner to read into the record Tanesha Robinson's February 11, 1993, and February 15, 1993, police statements.[1] He claims that, "The uncross-examined

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[1] On February 11, 1993, Tanesha told police that, while attacking Peter LaCourt, Sheldon Hannibal knocked on the door of an apartment occupied by "Junie" and his relative "Kim." "Junie" emerged from the apartment armed with a gun and helped Hannibal brutalize LaCourt. Four days later, Tanesha was shown

statements of Tanesha Robinson read by Det. Hoffner at Gregory's trial were the only evidence of Gregory's involvement in the homicide of Peter LaCourt." Petition at 19 (emphasis in original). This is incorrect.

Because Gregory and his cohorts murdered Tanesha Robinson prior to trial, she was declared unavailable as a witness and her testimony at the April 13, 1993, and May 4, 1993, preliminary hearings was read into the record. See N.T. 3/4/94 at 82-119. What Gregory conveniently neglects to mention is that the portions of Tanesha Robinson's police statements that implicate him in the murder of Mr. LaCourt were used to impeach Tanesha at the May 4, 1993, preliminary hearing, and were admitted as substantive evidence at that time. Therefore, these statements, and all of Tanesha's preliminary hearing testimony -- on which Gregory had a full and fair opportunity to cross-examine her -- were properly admitted into evidence at trial when this prior testimony was read into the record by James Brooks, the court crier. See N.T. 3/4/93 at 104-119. **Gregory does not challenge the admission of this preliminary hearing testimony**, which became necessary after Tanesha was murdered.

During the first preliminary hearing, Tanesha reiterated what she had said in her police statements, identifying Gregory as "Junie" and testifying that he had emerged from an apartment after Hannibal knocked on the door during the beating of LaCourt. See N.T. 3/4/94 at 89-

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a photo array from which she identified the defendant, Larry Gregory, as "Junie," the man who had aided in LaCourt's beating/murder.

90. Tanesha also indicated that Gregory assisted in the beating of LaCourt.[2] See N.T. 3/4/94 at 12-13. At the May 4th proceeding, Tanesha recanted her police statements and prior testimony, claiming that Gregory was not the man whom she saw assisting Hannibal in the beating/murder of Mr. LaCourt. The prosecutor impeached Tanesha with her two police statements, which were prior inconsistent statements and, thus, admissible as substantive evidence. See Commonwealth v. Kimbell, 759 A.2d 1273, 1278 (Pa. 2000) (prior inconsistent statements admissible as substantive evidence if declarant is witness and available for cross-examination). Tanesha admitted that she had picked out Gregory's photo from an array and that she had told police, "[This] is Junie, the guy who came out of the apartment and started beating the guy with Trini right before he got killed." See N.T. 5/4/93 at 27. She further admitted telling police that Junie lived with a relative named "Kim" in the first apartment on the second floor of the building in which LaCourt was slain, and that, after Hannibal had knocked on the apartment door, Junie had emerged with a handgun and helped beat Mr. LaCourt. See N.T. 5/4/93 at 17. Tanesha conceded that she had told the police that, prior to Mr. LaCourt's murder, she knew Junie about as well as she knew Trini, whom she had seen every day for the two weeks leading up to the killing. See N.T. 5/4/93 at 20. Tanesha

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[2] In light of her police statements in which she described Gregory's extensive involvement in the beating/murder of LaCourt, Tanesha could have offered a great deal more information about Gregory's role in the crime, but the preliminary hearing prosecutor neglected to elicit this information from her. Consequently, the Court discharged Gregory at the conclusion of that first proceeding.

also admitted that she had told the police that she was telling the truth. See N.T. 5/4/93 at 21. Although Tanesha claimed at the May 4th proceeding that Larry Gregory was nicknamed "June" rather than "Junie" and, therefore, was not the man she had identified as Hannibal's accomplice, she was unable to explain in any sort of coherent fashion why she had picked Gregory's photo out of an array and told police that "[This] is Junie, the guy who came out of the apartment and started beating the guy with Trini right before he got killed." See N.T. 5/4/93 at 24, 26, 27, 31. All of this testimony was read into the record at Gregory's trial, as was Tanesha's identification of Gregory at the April 13th preliminary hearing. See N.T. 3/4/94 at 89-90, 104-119. Accordingly, Gregory's assertion that, had Detective Hoffner not been permitted to read Tanesha Robinson's police statements into the record, there would have been no evidence implicating him in the murder, is false.

INACCURACY: "[T]wo years [after Gregory's trial] two other individuals were convicted for the homicide of Tanesha Robinson and her companions for reasons unrelated to the homicide for which Petitioner was convicted." Petition at 29.

This is another incorrect statement. It is true that, two years after Gregory's trial, Anthony "Lefty" Butler and Fred Daughtry[3] were convicted of Tanesha's murder. However, their convictions were not "unrelated" to the murder of Peter LaCourt, and their case did not exculpate Gregory in the slightest. The Commonwealth's theory of the case in the

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[3] Daughtry pled guilty and testified for the Commonwealth in the prosecution of Butler.

Butler trial was that, while Daughtry acted as a lookout, Tanesha was slain by Butler and Larry Gregory to prevent her from testifying against Gregory and Sheldon Hannibal.[4] The Commonwealth offered ample evidence to support this theory.

Fred Daughtry testified that, on the night that Tanesha and her two friends were murdered, Butler, Gregory and Gregory's brother, Duane Fountain, picked him up and took him to Fountain's apartment in the Cambridge Mall housing project -- which was in the same building in which the three girls were slain -- where they told him that he was going to act as a lookout for them while they "d[id] a job". See Commonwealth v. Butler, N.T. 5/15/96 at 93, 105. Then, Gregory went upstairs and entered the apartment in which Tanesha and her friends were murdered. See Commonwealth v. Butler, N.T. 5/15/96 at 98. He was followed shortly thereafter by Butler, who was armed with a .357 Magnum,[5] and Daughtry. Id. Butler entered the apartment while Daughtry stood guard outside. Id. Soon, Daughtry heard three to four gunshots. Id. A few minutes later, Butler exited the apartment followed by Gregory. Id. Butler wiped the door clean of fingerprints. See Commonwealth v. Butler, N.T. 5/15/96 at 99. Daughtry testified that he was paid $117

[4] The Commonwealth further argued that Tanesha's friends were killed because Gregory and Butler did not want to leave any witnesses.

[5] This corroborated Terrance Richardson's testimony in the instant case that Duane Fountain gave Lefty a .357 when he instructed him to kill Tanesha Robinson. See N.T. 3/3/94 at 73.

for his efforts. See Commonwealth v. Butler, N.T. 5/15/96 at 102. Approximately one week after the killings, Butler told Daughtry that they had murdered the girls because one of them was a witness against somebody. See Commonwealth v. Butler, N.T. 5/15/96 at 107-08, 113.

Marcia Adams, a friend of Tanesha Robinson's, testified that Tanesha was romantically involved with Larry Gregory. See Commonwealth v. Butler, N.T. 5/16/96 at 99-100. Just hours before Tanesha and her friends were slaughtered, Ms. Adams overheard Butler telling Tanesha that he was going to kill her. See Commonwealth v. Butler, N.T. 5/16/96 at 88, 90. At that point, Tanesha walked over to Ms. Adams and told her that Butler had said he had been paid to kill her and was going to do so. See Commonwealth v. Butler, N.T. 5/16/96 at 88, 90. Though Ms. Adams urged Tanesha and the other two victims to leave the area and stay at her house that night, Gregory dissuaded them from doing so, telling Tanesha that, if she cared about him, she would not believe that Butler had been hired to kill her and she would stay in the projects with him that night. See Commonwealth v. Butler, N.T. 5/16/96 at 94-95. Ms. Adams further testified that Butler had threatened to kill Tanesha because she was going to testify against Hannibal and Gregory. See Commonwealth v. Butler, N.T. 5/16/96 at 103.

During closing argument in that supposedly unrelated case, the Commonwealth argued that Butler and Larry Gregory killed Tanesha and her friends because Tanesha had threatened to testify against Sheldon Hannibal in his trial for the murder of Mr. LaCourt.[6] [7] See Commonwealth v. Butler,

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[6] The Commonwealth later brought charges against Gregory for his role in the murders of Tanesha

and her friends. Because of Marcia Adams' untimely death and Fred Daughtry's refusal to testify, however, the Commonwealth ultimately elected to *nolle prosse* the charges against Gregory, who was already serving a life sentence for Mr. LaCourt's murder. Gregory's good fortune should not be mistaken for innocence.

[7] It is worth noting that this argument was corroborated by Brian Gilmore, a/k/a James Buigi, who testified at Gregory's trial for the murder of Peter LaCourt. Prior to Mr. Gilmore's testimony, the prosecutor made an offer of proof during which he explained that Gilmore would testify that Hannibal had told him that "he told Junie, Junie being the co-defendant [Larry Gregory], that he needed [Tanesha Robinson] out of the way and that Junie and Vernon took care of it for him . . .." N.T. 2/28/94 at 90. At the behest of Gregory's counsel, the court instructed Gilmore to substitute the term "another party" for Gregory's name. N.T. 2/28/94 at 105. Ultimately, Gilmore testified that, while he and Sheldon Hannibal were sharing a prison cell, Hannibal told him that "his boys" had murdered Tanesha Robinson to prevent her from testifying against him. N.T. 2/28/94 at 122.

Curiously, in his petition for writ of certiorari, Gregory claims that, "Hannibal did not identify the 'boys'." Petition at 10. Obviously, this is incorrect; Hannibal specifically told Brian Gilmore that "Junie" was one of Tanesha's killers. Gregory's current misrepresentation on this point is at least slightly less disingenuous than Gregory's previous claim, made in the District Court, that Gilmore's testimony exonerated

N.T. 5/31/96 at 144, 155-56. The jury agreed, convicting Butler of three counts of first-degree murder, as well as retaliation against a witness/victim for his role in the slaying of Tanesha. See Commonwealth v. Butler, N.T. 6/3/96 at 4-6.

In light of the foregoing, Gregory's suggestion that Butler and Daughtry "were convicted for the homicide of Tanesha Robinson and her companions for reasons unrelated to the homicide for which Petitioner was convicted" is preposterous.

II. GREGORY'S ABSTRACT ASSERTION THAT THE LOWER COURTS NEED GUIDANCE ON HOW TO APPLY THE SCHLUP STANDARD DOES NOT MERIT A GRANT OF CERTIORARI.

In his lead argument, Gregory writes, "The Circuits require guidance about how to apply Schlup in cases like Gregory's in which credible post-conviction evidence discredits the only evidence presented against petitioner." Petition at 16. He proceeds to discuss various cases from assorted Circuits, which he claims were inconsistently

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him. See Petitioner, Larry Gregory's Objections to the Magistrate's Report and Recommendation Pursuant to Fed.R.Civ.P. 72(b) at (unnumbered page) 11 ("[T]he Commonwealth's own evidence demonstrated that another person was responsible for [Tanesha] Robinson's death. The Commonwealth evidence established that co-defendant, Sheldon Hannibal, had Ms. Robinson killed by his "boys" to prevent her from testifying against him.") (emphasis in original).

decided. Noticeably absent from this portion of Gregory's brief is any attempt to liken his own case to these allegedly inconsistent decisions or explain how this Court could reconcile these conflicting authorities by taking up the instant case. Indeed, save for the unsupported assertion made in the argument heading, Gregory does not discuss his own case at all. Thus, his lead argument is devoid of any compelling reason why certiorari should be granted **in this case**. See Rule 10 of the Supreme Court Rules.

Furthermore, the differing conclusions reached by different courts in the cases cited by petitioner do not establish that Schlup is being inconsistently applied. Rather, they demonstrate the wisdom of this Court's observation, **in Schlup itself**, that evaluating actual innocence claims is a "fact-intensive [] inquiry[.]" Schlup, 513 U.S. at 332. The relevance, significance and reliability of recantations, affidavits from uncalled witnesses and other types of new evidence varies greatly from case to case so no hard and fast rules (*e.g.*, recantation affidavits are always enough to warrant an actual innocence hearing) can be applied when the defendant asserts that he is actually innocent. Consequently, the cases cited by Gregory show that the courts are doing their job properly by evaluating actual innocence claims on a case-by-case basis.

III. GREGORY'S "NEW" EVIDENCE FAILS TO MEET THE SCHLUP STANDARD BECAUSE IT IS UNRELIABLE.

In his second argument, Gregory claims that his new evidence "has dismantled every piece of circumstantial evidence that the jury heard." Petition at 23 (emphasis in original). He contends that his new evidence exonerates him

from the murder of Tanesha Robinson and, therefore, her police statements should not have been admitted into evidence during his trial for the murder of Peter LaCourt.

As an initial matter, it must be pointed out that Gregory's actual innocence argument is based upon a faulty premise: that the "uncross-examined [police] statements of Tanesha Robinson read by Det. Hoffner at Gregory's trial were the only evidence of [his] involvement in the homicide of Peter LaCourt." Petition at 29 (emphasis in original). As explained above, the portions of Tanesha's police statements that incriminated Gregory were used to impeach her at the May 4, 1993, preliminary hearing, were subject to cross-examination on the record, and came into evidence at trial when Tanesha -- who had been murdered -- was declared unavailable and her preliminary hearing testimony was read into the record. **Gregory does not dispute that Tanesha's preliminary hearing testimony was properly admitted into evidence as the prior testimony of an unavailable witness.** Nor could he, since he had a full and fair opportunity to cross-examine Tanesha at the preliminary hearing. Thus, when Detective Hoffner read Tanesha's police statements at trial, the evidence was essentially cumulative, as the same information had come before the jury through the preliminary hearing testimony. Accordingly, even if Gregory's new evidence truly exonerated him of the murder of Tanesha Robinson – which it does not – it would be of no moment since the damaging portions of Tanesha's police statements were properly admitted at trial and would have been properly admitted even

if Gregory had not been responsible for the murder of Tanesha Robinson.[8]

In any event, Gregory's new evidence is unreliable and does not even come close to satisfying the actual innocence standard set forth in Schlup v. Delo, 513 U.S. 298, 324 (1995) (petitioner seeking to avoid procedural default on actual innocence grounds "must support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.").

A. TANESHA ROBINSON'S RECANTATION OFFERED AT THE PRELIMINARY HEARING WAS WHOLLY INCREDIBLE.

Though Tanesha Robinson's recantation of her police statements and April 13, 1993, preliminary hearing testimony is not an explicit part of Gregory's "new evidence" of actual innocence, he implies that her recantation was

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[8] Petitioner implies that the Magistrate's review of his actual innocence claim was less than thorough, writing, "In a footnote, the Magistrate's Report summarily rejected Gregory's claim of actual innocence." Petition at 16. As the Magistrate explained, however, petitioner made no attempt to support his allegation of actual innocence. See Report and Recommendation at 17, n. 3. Indeed, it is only in his petition for writ of certiorari that Gregory presents a coherent, developed –albeit incredibly disingenuous – actual innocence claim.

credible and consistent with his assertion that he did not murder Peter LaCourt. He is wrong.

At the May 4th preliminary hearing, Tanesha claimed the man who had aided Hannibal in the beating/murder of Peter LaCourt was not Larry Gregory but a man who was "darker" and "a whole lot taller" than Gregory. N.T. 3/4/94 at 106, 116, 118. This recantation was not credible for a host of reasons. First of all, Tanesha had previously picked out a photo of Gregory (whom she already knew from school) from an array and told police, "[This] is Junie, the guy who came out of the apartment and started beating the guy with Trini right before he got killed." N.T. 3/4/94 at 106, 114, 116, 118. Less than a month before her recantation, Tanesha had reaffirmed this identification at a prior preliminary hearing, identifying Gregory as "Junie" and testifying that he had emerged from an apartment after Hannibal knocked on the door during the beating of LaCourt. See N.T. 3/4/94 at 89-90. Tanesha also indicated that Gregory assisted in the beating of LaCourt. See N.T. 3/4/94 at 13 ("The guy **they** was beating up, the guy that got killed, was talking to Treeny.") (emphasis added).

The fact that key elements of the portions of Tanesha' police statements used to impeach her at the preliminary hearing were corroborated at trial also rendered her recantation incredible. For instance, Tanesha told the police that Junie, the man whom she saw aid Hannibal in the beating/murder of the victim and later identified as Larry Gregory, shared the first apartment on the second floor of 948 North 11th Street with his sister or cousin named "Kim." N.T. 3/4/94 at 134. This information was corroborated not only by Detective Walter Hoffner, but also by **petitioner's own mother**, who testified that Gregory shared an apartment

on the second floor of the building in question with his sister Kim. See N.T. 3/4/94 at 106, 134-35; 3/7/94 at 20. Gregory's mother conceded that he was the only "Junie" who shared an apartment on the second floor of the building with his sister named "Kim." It is important to note that Tanesha never recanted the portion of her police statement in which she claimed that the man who aided in the attack on Mr. LaCourt emerged from Gregory's apartment.

Tanesha's recantation was all the more incredible in light of the evasive, inconsistent and obviously untruthful manner in which she responded to questions at the May 4, 1993, preliminary hearing. In an attempt to explain away her prior inconsistent statements, Tanesha identified Larry Gregory as "June" rather than "Junie" and claimed that "Junie" was somebody else. N.T. 3/4/94 at 112, 118. This claim was contradicted not only by her February 15, 1993, police statement and April 13, 1993, preliminary hearing testimony in which she identified Larry Gregory as "Junie," but also by numerous other witnesses at trial who identified Mr. Gregory as "Junie", including Barbara Halley (N.T. 3/1/94 at 60), Terrance Richardson (N.T. 3/3/94 at 61), Gregory's girlfriend, Tomika Bullock (N.T. 3/7/94 at 25) co-defendant Sheldon Hannibal (N.T. 3/7/94 at 47-49) Gregory's brother, Duane Fountain (N.T. 3/7/94 at 72) and **Gregory's own mother** (N.T. 3/7/94 at 19-20).

Similarly, when asked how she knew Gregory, Tanesha initially answered, "I know him from school, from seeing him." N.T. 3/4/94 at 111. A few questions later, she contradicted herself, saying, "I don't know him from school, I just see him." Id. Right after that, however, she was asked, "How long did you used to see him at school?" and she replied, "For about a month." N.T. 3/4/94 at 112.

The jurors were privy to all of the foregoing testimony and, tellingly, convicted petitioner of Peter LaCourt's murder. In other words, they rejected Tanesha's recantation. Accordingly, Gregory's suggestion that Tanesha's recantation was reliable and supports his actual innocence claim is incorrect.

B. TERRANCE RICHARDSON'S RECANTATION HAS ALREADY BEEN FOUND WHOLLY INCREDIBLE BY THE STATE COURTS.

At trial, Terrance Richardson testified that, approximately one month before Tanesha Robinson and her two friends were brutally murdered, he inquired of Larry Gregory[9], who was out on bail, how his defense to the LaCourt prosecution was shaping up. In reply,

> [Gregory] said that the bitch, talking about Tanesha, she was up town, meaning that she, you know, she wasn't coming around the neighborhood, and he said that "That snitch ass bitch got to die."

N.T. 3/3/94 at 76-77. Richardson further testified that, on the day before Tanesha's murder, he was in Larry Gregory's apartment along with Gregory, Gregory's brother Duane Fountain, Vernon and "Lefty." Richardson testified that, after Duane Fountain had handed Lefty a .357 handgun and a wad of money, Gregory said, "It's $2,000, don't fuck up.

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[9] Richardson testified that Gregory went by the nickname "Junie." See N.T. 3/3/94 at 61.

That bitch got to die." He instructed Lefty to go into the apartment and "Don't leave no witnesses."[10] N.T. 3/3/94 at 73.

After the trial was over, Richardson recanted, claiming that it would have been physically impossible for him to attend the meeting at Gregory's house on August 3, 1993, because he had been shot in the leg three days before. According to Richardson, his leg was so swollen that he was housebound until August 20th. See N.T. 10/14/94 at 16-17, 20-21. He claimed that he had implicated Gregory in the murder of Tanesha Robinson because the police "kept beating me up." N.T. 10/14/94 at 32.

Richardson's recantation is the cornerstone of Gregory's actual innocence claim. He claims that it "was corroborated by his aunt and his grandmother, by his medical records and by Det. Hoffner." Petition at 23. What Gregory conveniently neglects to mention anywhere in his petition is that, after conducting a thorough evidentiary hearing, the PCRA Court found Richardson's recantation incredible, explaining:

> [T]his Court did not find the [Terrance Richardson's] testimony at the post-trial hearing credible. [] Despite the witness' assertion that he could not walk, testimony was presented that he was ambulatory,

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[10] Richardson's account of this meeting is corroborated by the subsequent conviction of Anthony "Lefty" Butler for the murders of Tanesha Robinson and her two friends who had the misfortune of being present when Butler and Gregory arrived to slay Ms. Robinson.

> albeit with crutches. The witness left the hospital with the aid of crutches and went home. Family members testified to his climbing the steps of his apartment with the aid of crutches to use the bathroom. Thus, the witness was ambulatory and capable of being at the defendant's apartment which was about a block from his home. The witness' claim of physical beatings at the hands of homicide detectives was refuted by the detectives. While acknowledging that they gave favors to the witness, including visits with his grandmother and girlfriends, the detectives were emphatic that the witness was never beaten, threatened or coerced. Again, resolution of this issue was made by a credibility determination which this Court made in favor of the detective. The defendant failed to establish that perjured testimony was introduced against him at trial.

PCRA Court Opinion of the Honorable Eugene H. Cla..e, Jr., Dated May 7, 1996, at 4-5. The AEDPA statute requires federal courts to afford a presumption of correctness to the PCRA Court's factual finding that Terrance Richardson's recantation was not credible. See 28 U.S.C. §2254(e)(1). Gregory has not even come close to rebutting this presumption with clear and convincing evidence. Instead, he pretends that no factual finding was ever made.

In any event, the PCRA Court's finding was amply supported by the record. As noted by Judge Clarke, despite his testimony that the gunshot wound made it so that he "couldn't get around," Richardson was able to walk with crutches. N.T. 10/14/94 at 20. Richardson's own grandmother, Lottie Richardson, disputed his claim that his

gunshot wound left him housebound from August 1, 1993, until August 20, 1993. When she was asked how long it was after the shooting before he was able to leave the house again, she answered "between three and four days." See N.T. 12/29/94 at 8. And upon further questioning, she conceded that during this three or four-day period when he was supposedly laid up, Richardson was able to go outside if he so desired. See N.T. 12/29/94 at 17. She even admitted that Richardson never mentioned that he was in any pain from the shooting. See N.T. 12/29/94 at 27.

On direct examination, Terrance Richardson's sister, Brenda, on the other hand, suggested that he "was disabled for 11 days or thereabouts." N.T. 12/29/94 at 36. But on cross-examination, she stated that "[H]e was not disabled." N.T. 12/29/94 at 41. She explained that he was able to walk with crutches and also conceded that she was not always home during the 11 days that he was allegedly housebound. See N.T. 12/29/94 at 36, 44.

Mr. Richardson's trial testimony that Gregory had Tanesha Robinson killed to prevent her from testifying was corroborated by Barbara Halley, who was with Mr. LaCourt in the Cambridge Mall Housing Project when he was attacked by Sheldon Hannibal. (Ms. Halley went to get help before Gregory joined in the beating and, thus, was unable to implicate him directly in the murder. See N.T. 3/1/94 at 46-50.) Ms. Halley testified that, prior to trial, Gregory, who identified himself as "Junie", approached her and offered her $1,000 to "disappear" and not come to court. N.T. 3/1/94 at 50, 60-61. Ms. Halley's testimony demonstrated that Gregory was so concerned about his upcoming joint trial with Hannibal that he was willing to tamper with witnesses in order to secure a favorable outcome, and thus, it corroborated

Richardson's trial testimony that Gregory asked him to kill Tanesha to prevent her from testifying.[11]

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[11] Ms. Halley's testimony is a powerful rebuttal to Gregory's suggestion that he had no motive to kill Tanesha Robinson. See Petition for Writ of Certiorari at 9, n. 6 ("There was no reason presented why Gregory wanted to prevent Tanesha Robinson's testimony as given at the Preliminary Hearing of May 4, 1993 that Gregory was not involved in the LaCourt homicide.") (emphasis added). As noted above, Barbara Halley never saw Gregory on the night of the murder and, thus, could not have directly implicated him at trial. Yet Gregory still offered her a bribe not to testify. It is important to remember the circumstances of the LaCourt murder. Hannibal was beating LaCourt mercilessly when he knocked on Gregory's door and invited him to participate, an offer that Gregory eagerly accepted. Since Gregory was willing to help Hannibal beat and murder LaCourt over a gold chain, it is not surprising that he would murder and bribe witnesses in order to prevent Hannibal from going to jail and/or being put to death. Furthermore, Gregory had strong personal motivations for killing Tanesha as well. First, by killing her, he could exact revenge for her having implicated him to police and at the first preliminary hearing. Secondly, murdering Tanesha ensured that she could not recant her recantation and implicate Gregory at trial. Indeed, it is unlikely that Gregory was aware that the preliminary hearing testimony of an unavailable witness may be read into the record and, thus, he probably believed that if he murdered Tanesha, there would be no eyewitness testimony of any kind linking him to the crime.

C. THE TWO MEN WHO WERE CONVICTED OF TANESHA ROBINSON'S MURDER WERE CO-CONSPIRATORS OF LARRY GREGORY.

The second piece of Gregory's new evidence of actual innocence is as follows:

In 1996, subsequent to Gregory's trial, two other individuals (not Larry Gregory or Sheldon Hannibal) were convicted for the murder of Tanesha Robinson and her friends: Fred Daughtry and Anthony Butler a/k/a "Lefty".

Petition for Writ of Certiorari at 10-11. As noted above, however, there was ample evidence presented at Anthony Butler's trial to show that Gregory and Butler murdered Tanesha Robinson to prevent her from testifying against Gregory and Sheldon Hannibal. See Response at 9-13.

Obviously, therefore, the trial and conviction of Butler did not exonerate Gregory in the slightest. Rather, it established exactly what the Commonwealth had contended at Gregory's trial for the murder of LaCourt: that Gregory killed Tanesha Robinson to prevent her from testifying.

D. FRED DAUGHTRY'S RECANTATION IS THOROUGHLY INCREDIBLE.

The final piece of Gregory's actual innocence claim is the recantation of Fred Daughtry. On February 8, 2000, Fred Daughtry signed an affidavit (in which his surname is misspelled as "Daugherty) claiming that he had falsely implicated Duane Fountain and Larry Gregory in the murders of Tanesha and her friends at the urging of the Philadelphia Police. He asserted that: 1) Tanesha was not murdered because she had witnessed a murder; 2) there was never a meeting that involved Duane Fountain and Larry Gregory and they were not at the scene of the crime; 3) he was never hired by Larry Gregory or Duane Fountain to take part in the murder; 4) his motive for acting as a lookout was to receive half of the drugs and money that were going to be recovered in the robbery turned homicide. Daughtry attributed his participation in the murder of Tanesha to his crack addiction and explained that, "As a man seeking forgiveness from God, not only have I repented and dedicated my life to him, I've learned that my guilty plea was the best thing to do[12] and I accept full responsibility for my actions." Apparently, Daughtry's spiritual awakening and acceptance of responsibility is not without its limits, however. In the very next sentence, he wrote, "Out of fear of destroying my chances of parole, I ask that it be clearly understood by all parties involved, I do not wish to give further testimony in this case. If my wishes go ignored and I am called as a

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[12] It is curious that Daughtry would conclude that entering into a plea bargain with the Commonwealth was the morally right course of action since, if his recantation is to be believed, the deal required him to perjure himself and implicate an innocent man.

witness, at that point I will invoke my Fifth Amendment right to not testify."

Daughtry's recantation is preposterous. First of all, he is unwilling to exonerate Gregory in a court of law. He concludes his affidavit by saying, essentially, "Let us never speak of this again." For this reason alone, Daughtry's recantation should be rejected out of hand. Furthermore, his assertion that Tanesha Robinson was murdered over drugs and Gregory was not involved is contradicted by: 1) Terrance Richardson's testimony at the trial of Larry Gregory and Sheldon Hannibal in which he described the August 3, 1993, meeting at Gregory's house during which Gregory and his brother, Duane, gave Anthony Butler $2,000 and a .357 handgun – the very same type of weapon that Daughtry testified Butler carried into the apartment in which the murders took place – and told him "That snitch ass bitch got to die"[13]; and 2) Marcia Adams' testimony at the Butler trial indicating that Butler had been paid to kill Tanesha and that Gregory had cajoled Tanesha into staying in the projects on the night that he and Butler murdered her. Nor is Daughtry's recantation corroborated by his co-conspirator, Anthony "Lefty" Butler. Butler is serving life in prison and has nothing to lose by exonerating Larry Gregory. Tellingly, he has not done so.

As Justice Brennan noted in dissent from this Court's denial of certiorari in Dobbert v. Wainwright, 468 U.S. 1231 (1984):

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[13] Richardson's testimony is also corroborated by co-defendant Sheldon Hannibal's statement to Brian Gilmore that Gregory killed Tanesha Robinson to prevent her from testifying.

> Recantation testimony is properly viewed with great suspicion. It upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction.

Dobbert, 468 U.S. 1233-34 (1984). It is impossible to believe Daughtry's uncorroborated, one-time-only recantation in light of Gregory's well-documented history of tampering with, and murdering, witnesses.

In Schlup, the defendant had been convicted of murdering another man in a prison fight. In support of his actual innocence claim, the defendant presented the Court with affidavits from three neutral eyewitnesses who claimed that he did not commit the murder as well as sworn statements from two other neutral witnesses which placed the defendant in another area of the prison at a time so close to that of the murder that it cast serious doubt upon his guilt. These affidavits, coupled with compelling videotape evidence presented at trial, persuaded the Supreme Court to remand the case for a hearing on actual innocence.[14]

Obviously, Gregory's "new evidence", which is either unreliable or inculpatory, does not even come close to

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[14] Upon being granted a new trial by the District Court, Schlup promptly pled guilty to the very crime of which he claimed to be actually innocent. Thus, the archetype of actual innocence was, apparently, actually guilty.

satisfying the Schlup standard. Even if one were to accept Gregory's argument that the Courts of Appeals have been applying Schlup inconsistently, it would be of no moment here. No Court in any Circuit has concluded that a petitioner can establish actual innocence with: 1) a recantation deemed incredible by the state courts where the credibility determination was made after a full evidentiary hearing and the petitioner makes no attempt to explain why the determination was erroneous; 2) evidence presented at another trial that **inculpates** petitioner in the crime from which he is asserting his actual innocence; and 3) an uncorroborated recantation from a witness who refuses to testify about the recantation under oath. Accordingly, Gregory's actual innocence claim is woefully insufficient.

IV. EVEN IF THIS COURT DID GRANT CERTIORARI, IT WOULD HAVE TO DECLINE GREGORY'S INVITATION TO DECIDE THE CRITICAL QUESTION OF WHETHER ADMISSION OF HEARSAY EVIDENCE UNDER A FORFEITURE BY WRONGDOING EXCEPTION TO THE HEARSAY RULE VIOLATES THE CONFRONTATION CLAUSE SINCE THAT ISSUE IS PROCEDURALLY DEFAULTED.

Finally, Gregory urges this Court to grant certiorari in order "to decide the critical question of whether admission of hearsay evidence under a forfeiture by wrongdoing exception to the hearsay rule violates the Confrontation Clause." Petition at 25. Even if this Court were to grant certiorari in this case, it could not decide this "critical question" since petitioner has procedurally defaulted this issue.

In its Order denying Gregory's request for a Certificate of Appealability, the Court of Appeals held that petitioner had failed to alert the state courts to the federal nature of his claim that the trial court erred in admitting Tanesha Robinson's police statements into evidence. Petitioner does not even acknowledge the Third Circuit's holding, much less refute it. The Court of Appeals was right: this claim is procedurally defaulted. See Anderson v. Harless, 459 U.S. 4, 6 (1982); Coleman v. Thompson, 501 U.S. 722, 749 (1991).

Petitioner does not attempt to establish cause and prejudice for his default and, as explained above, his actual innocence claim is woefully insufficient. Accordingly, he cannot escape default. See Coleman, supra.

In any event, if he had not defaulted the claim, petitioner would not be entitled to review. Confrontation Clause violations are subject to a harmless error analysis. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). As explained above, the portions of Tanesha Robinson's police statements that implicate Gregory in the murder of Peter LaCourt were used to impeach Tanesha at the May 4, 1993, preliminary hearing and were admitted as substantive evidence at that time. This preliminary hearing testimony was properly read into the record at Gregory's trial since Tanesha's murder had rendered her unavailable to testify and Gregory had had a full and fair opportunity to cross-examine her at the preliminary hearing. (Indeed, Gregory does not challenge the admissibility of Tanesha's preliminary hearing testimony.) Accordingly, the trial court's decision to allow the police statements to be read into the record was, at worst, harmless error since the damaging portions of those

statements had already been properly admitted into evidence as part of Tanesha's preliminary hearing testimony.

CONCLUSION

For the reasons set forth above, respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

RONALD EISENBERG
Deputy District Attorney
THOMAS W. DOLGENOS
Chief, Federal Litigation
J. HUNTER BE[illegible]ETT
Assistant District Attorney
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

DATED: January 3, 2006

(3)

No. 05-341

In The

Supreme Court of the United States

LARRY GREGORY
Petitioner

v.

JAMES L. GRACE,
SUPERINTENDENT SCI-HUNTINGDON,
LYNNE ABRAHAM, DISTRICT ATTORNEY
OF PHILADELPHIA COUNTY,
THOMAS CORBETT,
ATTORNEY GENERAL OF PENNSYLVANIA
Respondent(s)

On Petition For Writ of Certiorari
To the Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ENID W. HARRIS, ESQUIRE
Pa. Supreme Court ID #30097
26 Pierce Street
Kingston, Pa., 18704
Phone: (570) 288-7000
Fax: (570) 288-7003
E-Mail: eharris@epix.net

DATE: January 23, 2006 Counsel for Petitioner,
Larry Gregory

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REPLY BRIEF FOR THE PETITIONER

The Commonwealth does not dispute that the conviction of the Petitioner for the homicide of Peter LaCourt in 1994 was based on the allegation that Petitioner and his co-Defendant arranged for the murder of a witness (Tanesha Robinson) and two others, rather than on direct or circumstantial evidence that the Petitioner committed the murder for which he was tried[1]. There is also no dispute, that two years after Petitioner's conviction, two other individuals (Fred Daughtry[2] and Anthony Butler) were convicted for the murders of Tanesha Robinson

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[1]The assertion that the testimony of Barbara Halley that Gregory gave her $1,000 not to testify at his and Sheldon Hannibal's trial is circumstantial evidence of Gregory's guilt ignores Halley's testimony that she was unable to identify anyone other than Sheldon Hannibal who was involved in the homicide of LaCourt.

[2]In addition to the Affidavit of February 8, 2000, referenced in the Petition for Writ of Certiorari (p. 11), Daughtry testified at the Preliminary Hearing for the Robinson Homicide that Gregory was not involved (N.T. 5/18/99). Daughtry also submitted an Affidavit for Sheldon Hannibal on September 2, 2005.

and her companions. There is no dispute that Gregory was not charged with Tanesha Robinson's homicide until more than three years after he was convicted for the homicide of Peter LaCourt and the charges were *nolle prossed* another three years later for lack of evidence. There is no dispute that the witness (Richardson) whose testimony was presented at Petitioner's trial in support of the proposition that Petitioner and his co-Defendant had Tanesha Robinson and her friends murdered later recanted his testimony. The Commonwealth's Brief in Opposition, like the prosecutor at Petitioner's trial, seeks to convict Gregory of the LaCourt homicide by using uncross-examined hearsay, recanted and perjured testimony and factual misstatements and innuendo to suggest that Gregory committed other murders for which two others were convicted and for which the Commonwealth dropped the charges against Gregory for lack of evidence.

Petitioner files this Reply in Response to the Brief filed

by the Commonwealth. Page space limitations do not permit reply to all of the issues and facts raised in the Commonwealth's Brief. Petitioner responds to those factual and legal assertions that most require an answer, and relies upon his Petition for Writ of Certiorari to support his other claims.

I. The Commonwealth's catalog of so-called factual misstatements is itself replete with misstatements, inaccuracies and subterfuge.

The Commonwealth argues that the uncross-examined police statements of Tanesha Robinson read by Det. Hoffner at Gregory's trial were admitted as prior inconsistent statements at the Preliminary Hearing of May 4, 1993, and Gregory does not challenge their admission as such (BIO, p. 7). To the contrary, Gregory challenges the admission of the uncross-examined police statements pursuant to this Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 Sup.Ct. 1354 (2004), whether they are characterized as prior inconsistent

statements or as admissible under a forfeiture-by-wrongdoing exception to the hearsay rule. Moreover, it is misleading to say that Gregory had an opportunity or a reason to cross-examine Tanesha Robinson at the May 4, 1993 Preliminary Hearing. At the May 4, 1993 Hearing, Robinson emphatically disavowed her police statements that Gregory was the person who joined Hannibal in beating Peter LaCourt. She also testified that her prior identifications of Gregory in a photo array and at a Preliminary Hearing on April 13, 1993, were at the direction of Det. Hoffner who told her to identify Gregory. Robinson testified: "They was telling me more than they was asking me. They was telling me that this was the guy that was there, did I recognize him. I said yes." (N.T. 5/4/93, p. 18).[3][4]

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[3]Tanesha Robinson also signed an Affidavit on April 27, 1993, indicating that the individual who joined Hannibal in beating LaCourt was not Gregory.

[4]Similar allegations of directions from Det. Hoffner or Det. Dembeck were also made by Terrance Richardson (N.T. 12/9/94) (Pet. pgs.. 11-12) and by one of Tanesha Robinson's actual killers, Fred Daughtry (N.T. 5/18/99)(Affidavit of

The Commonwealth urges that the testimony of Marcia Adams at Anthony Butler's trial in 1996 concerning an overheard conversation between Tanesha Robinson and her killer (Butler) had something to do with Gregory (BIO, p. 11). In the conversation, Butler told Robinson that he was going to kill her (N.T. 5/16/96). Butler did not mention Gregory (N.T. 5/16/96, pp. 85, 90). Adams' testimony was additional evidence that Butler (with Daughtry as his lookout) not Larry Gregory was Tanesha Robinson's killer.[5]

The Commonwealth represents (BIO, p. 18) that defense witnesses referred to Gregory as "Junie". A review of the record indicates that only the prosecutor and his witnesses used that name and Gregory's mother corrected the prosecutor saying

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2/8/00). Marcia Adams was also guided by Det. Hoffner (N.T. 5/18/96).

[5]Notably, Adams did not call the police when Tanesha Robinson was found murdered nor did she mention the conversation when Dets. Hoffner and Robinson initially interviewed her. She revealed the conversation for the first time when she testified at Butler's trial in 1996.

"June. I call him June." (N.T. 3/7/94, p. 19).

The Commonwealth (BIO, p. 12, ftnt. 7) asserts that statements by Sheldon Hannibal to Brian Gilmore a/k/a James Buigi, an alleged cellmate of Gregory's co-Defendant Hannibal, corroborated the complicity of Gregory and Hannibal in Robinson's homicide, yet the Commonwealth is fully aware that prison records (that the Commonwealth withheld at trial) have established that Buigi was not Hannibal's cellmate and perjured himself at trial.[6]

II. The Commonwealth's assertion that the recantations of Terrance Richardson and Tanesha Robinson are incredible is baseless and misleading.

The Commonwealth argues that the recantations of Terrance Richardson and Tanesha Robinson are unreliable. The Commonwealth's arguments are contrary to the facts, which are more fully set forth in Gregory's Petition (pp. 10-12) indicating

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[6]The prison records have been uncovered by Hannibal's post-conviction counsel and have been submitted in Hannibal's post-conviction proceedings.

that Terrance Richardson's disability was corroborated by his aunt, his grandmother, his medical records and Det. Hoffner. Tanesha Robinson was emphatic and unequivocal at the Preliminary Hearing of May 4, 1993. The finding of Gregory's PCRA Court that Richardson's recantation was not credible is not entitled to any deference. The Commonwealth would have this Court discredit the testimony of Terrance Richardson by crediting the uncross-examined police statements and recanted testimony that were improperly admitted at Gregory's trial and upon which the jury convicted Gregory even though there was no direct or circumstantial evidence of his guilt.[7]

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[7]The Commonwealth argues that Fred Daughtry's Affidavit of February 8, 2000, is not credible while, at the same time, arguing that Daughtry's other statements make a case against Gregory for Tanesha Robinson's murder. (Daughtry also denied Gregory's involvement in the Robinson homicide at a Preliminary Hearing on May 18, 1999.) The Commonwealth displays the same "I want to have my cake and eat it too" attitude about Terrance Richardson. When the testimony at Gregory's trial went their way and permitted the jury to convict Gregory of LaCourt's murder without evidence because of the later discredited allegation that Gregory committed other murders, Richardson

III. The question of whether the admission of hearsay under a forfeiture-by-wrongdoing exception to the hearsay rule violates the confrontation clause was not procedurally defaulted and, if it was, this Court can address the issue because Gregory is actually innocent.

The issue of the proper admission of the contents of the unsworn police statements of Tanesha Robinson was raised in the State Courts. The Federal Magistrate and the Third Circuit Court of Appeals determined that the issue was procedurally defaulted because it was raised as a State constitutional claim only. The District Court and the Third Circuit Court of Appeals failed to acknowledge that the Confrontation Clauses of the Pennsylvania and United States Constitutions are identical in history and in text, except the Pennsylvania Constitution goes further and recognizes the right to confront witnesses face-to-face. Pa.Const. Art. I, §9; *Cmwlth v. Ludwig*, 594 A.2d 281 (Pa. 1991). See also: Gormley, et al. The Pennsylvania

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was credible. When Richardson later recanted his testimony, the Commonwealth did not like it and now argues that the recantation was incredible.

Constitution: A Treatise on Rights and Liberties, §§12.1— 12.4 (2004). The Pennsylvania Constitutional issue raised by Gregory suggested and raised its United States Constitution counterpart so that the state courts were aware of and should have addressed the issue.

Even if the issue is determined to be procedurally defaulted because it was not expressly premised on the Confrontation Clause of the United States Constitution, the issue was and is properly before the federal courts because Gregory has made a showing of actual innocence and procedural default is excused under *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851 (1995).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari, Certiorari should be granted.

Respectfully submitted,

ENID W. HARRIS, ESQUIRE
Pa. Supreme Court ID #30097
26 Pierce Street
Kingston, PA 18704
Phone: (570) 288-7000
Fax: (570) 288-7003
E-Mail: eharris@epix.net
Counsel for Petitioner,
Larry Gregory

DATED: January 23, 2006